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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO. _____

SHEILA DARLENE COON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Can the government rely on a drug courier profile, standing by itself, to justify reasonable suspicion to conduct a *Terry* investigatory stop?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AMENDMENT INVOLVED .. 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE DECISION BELOW RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, TO WIT, WHETHER A DRUG COURIER PROFILE CAN, STANDING ALONE, ESTABLISH REASONABLE SUSPICION FOR A TERRY STOP..... 6

CONCLUSION 8

APPENDIX 1A

TABLE OF AUTHORITIES

CASES

Florida v. Royer, 460 U.S. 491 (1983) 7, 8, 11

Immigration and Naturalization Service v. Delgrado, 466 U.S. 210 (1984) . 5

Marcus v. Search Warrant, 367 U.S. 717 (1961) 9

Reid v. Georgia, 448 U.S. 438 (1980) 10

Stanford v. Texas, 379 U.S. 476 (1965) 10

United States v. Caleb, 552 F.2d 717 (6th Cir. 1977) 9

United States v. Place, 462 U.S. 696 (1983) 12

United States v. Sokolow, 490 U.S. 1 (1989) 10

Wong Sun v. United States, 371 U.S. 471 (1963) 9

STATUTES

21 U.S.C. § 841 6

28 U.S.C. § 1254(1) 6

CONSTITUTIONAL PROVISIONS

U.S. CONST.amend. IV 2

MISCELLANEOUS

16 Search and Seizure L. Rep. 121 (1989) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sheila Darlene Coon, the defendant in the district court and the appellant in the court of appeals, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *United States* v. *Coon*, 6th Cir. No. 89-1489 (March 19, 1991).

OPINIONS BELOW

The court of appeals' opinion is unreported and is reproduced at pp. 1A-

13A of the appendix to this *certiorari* petition (hereafter "Pet. App.").

The district court's order denying the defendant's motion to suppress is unreported and is reproduced at Pet. App. 14A-24A.

JURISDICTIONAL STATEMENT

The court of appeals' opinion was entered on March 19, 1991 (Pet. App. 1A). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). On June 7, 1991, the Honorable Justice John Paul Stevens granted an Order extending the time for filing the petition for writ of certiorari until August 16, 1991.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath, or affirmation,and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

STATEMENT OF THE CASE

Petitioner Sheila D. Coon was convicted of possession with intent to deliver cocaine in violation of Title 21, United States Code § 841, which provided

the court of first instance with jurisdiction. Prior to trial, Ms. Coon moved to suppress the evidence which was the subject matter of the indictment. After conducting an evidentiary hearing, the trial judge denied the motion (Pet. App. 14A). Ms. Coon appealed the trial court's ruling following the trial, and the court of appeals affirmed (Pet. App. 11A).

Ms. Coon was arrested at Detroit Metropolitan Airport after a search of the luggage she was carrying revealed two "bricks" of what was later confirmed to be cocaine. According to the factual findings of the trial court, which are taken as true for the purposes of this petition, the following chain of events led to the discovery of the contraband.

Prior to Ms. Coon's involvement in the case, two Drug Enforcement Agency Officers observed two males enter LA Airport and purchase two one-way tickets for Flight 336 to Detroit for cash. The men acted as if they did not know each other in the terminal, although they arrived at the airport and departed in the same car. (Pet. App. 15A.)

A short time later, the men returned and one entered the terminal while the other remained on the car. Thereafter, the man who had remained in the car entered the terminal and headed for the boarding area. He was stopped at this time by DEA agents who, after obtaining his consent, searched him but found only a shirt and a pair of shoes. This man also told the agents he had arrived at the airport alone by taxi. (Pet. App. 16A.)

In the meantime, the person who had first entered the terminal purchased another ticket for Flight 336. Ms. Coon approached this man while he was at the ticket counter and handed him her luggage after being given the newly purchased ticket. He checked the baggage, and gave the claim tickets to Ms. Coon, and told her to hurry and get on the plane and leave. (Pet. App. 16A.) The trial court concluded that this activity constituted the reasonable suspicion necessary to justify a *Terry* stop (Pet. App 24a).

The agents did not stop Ms. Coon at the LA airport. However, they conveyed their suspicion along with her description to DEA agents in Detroit. Upon deplaning, Ms. Coon was observed to walk through the airport, stopping once at the restroom, on her way to the baggage claim area. After claiming her baggage, she was stopped by two Detroit agents who identified themselves as narcotics agents, and then questioned her, with her permission, between the two sets of exit doors. (Pet. App. 18A.) The trial court concluded that this activity was not a custodial interrogation requiring probable cause. (Pet. App. 21A, 24A.)

After questioning the defendant and examining her plane ticket, the agents searched her purse. Upon finding the Defendant's drivers license did not match the name on the plane ticket, the agents searched Ms. Coon's luggage. The trial court found that Ms. Coon had consented to these searches. (Pet. App. 23A-24A.)

The court of appeals affirmed the trial court's ruling denying the motion to suppress, affirming the trial court's rulings on each of the issues raised by

Ms. Coon. With regard to the activity which gave rise to reasonable suspicion for the *Terry* stop, however, the court of appeals stated:

> This finding, however, is not necessary to a determination that the search of the defendant's luggage comported with the Constitution, because the police officers would have been free to request consent to search even though they had no suspicion whatever of criminal activity on her part. While a request for consent to search in the absence of any suspicion might well be irrational or inexplicable, that fact would not render the consent any less free nor the fruits of an consequent search inadmissable. (Pet. App. 9A.)

However, by addressing the issue of whether there was reasonable suspicion for a *Terry* stop, by implication the trial court must have concluded that either the initial contact between Ms. Coon and the agents was a *Terry* stop, or that at some point, the initially consensual encounter was transformed into a seizure or detention within the meaning of the Fourth Amendment. *See Immigration and Naturalization Service* v. *Delgrado*, 466 U.S. 210, 215 (1984). The trial court devoted five (5) pages of factual findings (Pet. App. 14A-19A), and over a full page of analysis (Pet. App. 20A-21A) from its 13 page Memorandum and Order solely to the issue of whether there was reasonable suspicion for a *Terry* stop.

The Order addressed two issues. The Fourth Amendment issue contained four (4)

sub-issues of which the "drug courier profile" was one. It is highly incredible to conclude that the trial court would devote almost one half of its 13 page opinion to an issue which it concluded need not be addressed at all. That is, if the trial court concluded that there was a completely voluntary encounter between the agents and Ms. Coon, then it need not have reached the issue of whether reasonable suspicion existed for the stop of Ms. Coon.

What, in fact, the trial court held was that the DEA agents activity with respect to the encounter with Ms. Coon did not amount to a custodial interrogation which would have required probable cause (Pet. App. 22A-23A). The trial court analyzed the facts to determine whether Ms. Coon was in custody at any time before she was arrested for the cocaine. After determining that she was not in custody, the court determined that her consent to search her luggage was not coerced. (Pet. App. 23A-24A.)

The court of appeals held that the trial court was justified in holding that the agents had reasonable suspicion to conduct an investigative stop. (Pet. App. 9A.) That court held that the finding was unnecessary, however, in light of the trial court's factual findings, which were not clearly erroneous, that Ms. Coon was not in custody at the time she gave the consent to search her luggage.

While the holding that Ms. Coon was not in custody when she consented to the search of her luggage precludes a claim in the instant case that the consent was not voluntary, it does not end the inquiry into whether the consent was

tainted by other unconstitutional conduct. An initial Fourth Amendment violation can serve to taint evidence which is subsequently discovered by lawful means. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

If the initial investigatory stop was made without reasonable suspicion, and if the consent is not otherwise attenuated from the original illegal activity, the consent may still be tainted. *See United States* v. *Caleb*, 552 F2d 717 (6th Cir. 1977), and Wong Sun, supra.

In the instant case, the "suspicion" which gave rise to the Terry stop was based entirely on a drug courier profile. Specifically, the agents based their suspicion on the following factors: Ms. Coon's ticket one-way ticket was purchased with cash from a "source city". In addition, the man who purchased the ticket for Ms. Coon arrived at the airport on two different occasions with another man, and apparently tried to conceal the fact that they were together. The men also apparently were looking around the airport while waiting to buy their tickets.

Upon these facts, the trial court ruled, and the court of appeals affirmed that there was a reasonable suspicion for a *Terry* stop. In fact, the trial court cited to *Florida* v. *Royer*, 460 U.S. 491 (1983) for the proposition that reasonable suspicion could be founded solely on a drug courier profile:

> In *Royer*, the plurality of opinion of the Court indicated that the presence of various factors of a drug courier

profile could establish a sufficient reasonable suspicion to justify a temporary detention within the bounds of *Terry*. *Royer*, 460 U.S. at 506, fn. 10.

REASONS FOR GRANTING THE WRIT

Literally millions of people travel through this country's airports every year. The vast, vast majority of these travelers are not involved in any criminal activity. While there is a serious drug problem in this country, and while an extremely small portion of travelers will unfortunately use plane travel as a vehicle to transport illegal drugs, innocent travelers should not be treated as suspects and thus subjected to unnecessary and embarrassing searches and seizures at the hands of the government simply because their innocent activity falls into the "chameleon-like" profile of a drug courier. (*See, e.g., United States* v. *Sokolow*, 490 U.S. 1 (1989), Justice Marshall dissenting at 13-14, wherein he lists a multitude of factors used by drug enforcement personnel to establish a drug courier profile. As Justice Marshall astutely observes, the circumstances giving rise to the profile are capable of changing into their diametric opposites to justify a "reasonable suspicion" in a given situation.)

If a drug courier profile can establish reasonable suspicion to conduct an investigatory stop, then anyone using an airport could be subject to a *Terry* detention. The behavior which could indicate drug trafficking would be limited only by a clever official's imagination and/or experience. Innocent behavior such as appearing nervous, buying one-way tickets with cash,

traveling to and from source cities, and looking around the airport have been used to establish reasonable suspicion for investigatory stops. Under this scenario. a person who is afraid of flying, is without credit cards, needs to fly to "source city", and likes to watch people, is subject to being detained. Certainly, a great number of innocent travelers could share these patterns of behavior.

The Fourth Amendment protects against these types of broad dragnet searches. The Fourth Amendment was drafted in reaction to sweeping, indiscriminate searches. *See, e.g., Stanford* v. *Texas*, 379 U.S. 476 (1965), *and Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). While it is admitted that there are limited occasions where the privacy rights of individuals must yield to the investigation of crime, innocent travelers should not be subjected searches and seizures based on "imprecise stereotypes of what criminals look like." *Sokolow, supra*, Justice Marshall dissenting at 12. The focal mandate of the Fourth Amendment is that searches and seizures cannot be justified on grounds which could subject vast numbers of innocent citizens to invasions of their persons, houses, papers and effects at the hands of the government.

I. THE DECISION BELOW RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, TO WIT, WHETHER A DRUG COURIER PROFILE CAN, STANDING ALONE, ESTABLISH REASONABLE SUSPICION FOR A TERRY STOP.

The United States Supreme Court has never ruled directly on the constitutionality of using a drug courier profile to provide reasonable suspicion for *Terry* stops. The lower court in the instant case, along with other lower courts, has ruled on this important question of federal law. Moreover, these rulings have far reaching implications for vast numbers of innocent travelers who are subjected, or at least potentially subjected, to intrusive searches and seizures for entirely innocent behavior.

In *Reid* v. *Georgia*, 448 U.S. 438 (1980), this Court had an opportunity to pass on the constitutionality of using drug courier profiles, but did not. Mr. Reid was detained because he displayed certain characteristics which matched a drug courier profile. The characteristics, which are strikingly similar to the ones in the case at bar, included: (1) traveling to a source city; (2) traveling with another person while attempting to give the appearance of traveling alone; (3) traveling with only a shoulder bag; and (4) traveling in the early morning hours.

In a per curiam opinion, this Court held that as a matter of law these facts could not create a reasonable suspicion that criminal activity was afoot, *id.* at 441. This Court reasoned that of the evidence relied on, only the defendant's attempt to conceal the fact that he was not alone related to his particular conduct. All the other indices relied on were equally amenable to innocent activity.

In *Sokolow*, *supra*, this Court relied on some 14 "facts" which engendered the

reasonable suspicion necessary to support an investigatory detention. These factors included: (1) the defendant's relative youth; (2) paying cash for round trip tickets from a large bankroll of twenty dollar bills; (3) traveling a long distance to a source city for a short stay; (4) wearing gold jewelry; and (5) appearing nervous. The law enforcement officer involved also had reason to believe that Sokolow was traveling under an assumed name.

Once again, this Court did not rule squarely on the issue of whether a match between a person and a profile standing alone can generate reasonable suspicion. This Court held that under a totality of the circumstances approach, the law enforcement agents had established probable cause. This Court again tacitly declined to rule on the issue of whether a person who matches a drug courier profile can be detained under *Terry*.

In the case at bar, the trial court held that a plurality of this court had held in *Royer*, *supra*, that a drug courier profile could establish a reasonable suspicion to justify a *Terry* detention (Pet. App. 24a). However, the footnote cited to support this proposition is inapposite. The *Royer* Court held only that a reasonable suspicion could justify subjecting the defendant's luggage to a canine sniff for contraband.

However, in *United States* v. *Place*, 462 U.S. 696 (1983), this Court held that a canine sniff of luggage which was kept in public did not entail Fourth Amendment activity. The Court reasoned that because the canine sniff did not subject the owner of the luggage to the embarrassment and inconvenience of a

traditional search, and because the canine sniff would not reveal anything about the contents of the luggage other than the fact that it contained contraband, a canine sniff done in this matter was "*sui generis*" and did not implicate the Fourth Amendment. Thus, it is not clear that even a plurality of this Court ever held that a match with a drug courier profile could create reasonable suspicion to justify a traditional *Terry* detention.

This decision is indicative of the extant confusion existing in the lower courts as to whether or not a drug courier profile can be used to establish reasonable suspicion. Thus, this Court should rule directly on this issue to provide the necessary guidance. This Court should also rule directly on this issue because the current state of the law affords law enforcement officials too much discretion to conduct indiscriminate searches:

> [P]roffile prompted searches and seizures have a more direct effect on persons who, from the perspective of drug enforcement agents, appear to be criminals than they do on persons who may have been, are now, or may about to be involved in criminal activity. Richardson, *Traveling and the Fourth Amendment in Light of United States v. Sokolow: the Cost of Looking Suspicious*, 16 Search and Seizure L. Rep. 121, 124 (1989).

If drug enforcement agents are permitted to establish reasonable suspicion solely by articulating a

lengthy list of factors all of which in isolation are innocent, but which when taken as a whole can create reasonable suspicion, then the agents can create reasonable suspicion for detaining everybody. If there is no weighing of the individual factors, then paying cash for a ticket can be just as indicative of criminal activity as fleeing from the approach of a known law enforcement officer.

And finally, by allowing agents to use drug courier profiles to establish reasonable suspicion, and allowing them to use innocuous characteristics to establish the profiles, the agents are encouraged to develop ever longer lists of factors which comprise the profile of a drug courier. Thus, an ever increasing number of innocent persons are subject to being swept up in the dragnet as their personal integrity and security are sacrificed to the "frenzy of interdiction".

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 89-1489

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appelllee,

v.

SHEILA D. COON

Defendant-Appellant.

Decided March 19, 1991

Before: MARTIN and MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Shelia Coon appeals her conviction for possessing cocaine with intent to distribute it, a violation of 21 U.S.C. § 841(a) (1). Defendant Coon contends that the officers who searched her luggage at the Detroit Metropolitan Airport stopped her without reasonable suspicion and searched her luggage without probable cause, thus violating the Fourth Amendment. She also claims that evidence of her prior robbery convictions should not have been introduced against her for impeachment purposes. For the reasons

that follow, the judgment of conviction is affirmed.

I.

Some unusual events first aroused the suspicions of narcotics officers at the Los Angeles International Airport in the late evening hours of June 1, 1988. Defendant Shelia Coon, who had aroused their suspicions, left the airport on Flight 336, traveling on a one-way ticket paid for in cash to Detroit, Michigan. Before Flight 336 arrived at the Detroit Metropolitan Airport, the narcotics officers in Los Angeles had relayed their suspicions to officers Raymond Denton and Michael Ondejko, both of whom were assigned to the Drug Enforcement Administration Task Force at the Detroit Airport. Based upon the information they received from Los Angeles, the officers decided to interview defendant Coon upon her arrival in Detroit. After allowing her to claim her luggage, they approached her, identified themselves, and asked permission to speak to her. Both officers were in plain clothes and no weapons were visible, if indeed either was actually armed.

The encounter took place as defendant Coon, carrying her luggage, passed through one set of automatic doors into a vestibule and prepared to pass through another set of automatic doors about ten feet away in order to leave the baggage claim area. Defendant Coon stopped between these two sets of automatic doors in the public area of the terminal and agreed to talk to the officers. During the conversation and at the officers' request, Ms. Coon permitted the examination of her ticket and her purse. The ticket bore the name "Kim Johnson," but the California driver's

license found in her purse identified her as Shelia Coon, a circumstance that led the two officers to identify themselves further as narcotics officers and to request permission to search the luggage she had just reclaimed.

According to the unrebutted testimony of both officers, Coon gave her consent to the search of the luggage at her feet, although in the same breath she mentioned that she was uncertain about whether one of the pieces, a foldable garment bag, was actually hers. Officer Ondejko's search of that bag produced two "bricks" of cocaine.

Defendant Coon moved to suppress the cocaine but did not testify at the suppression hearing. At the hearing it was argued that she had been seized without probable cause or stopped without reasonable suspicion in violation of the Fourth Amendment and that her consent was therefore involuntary. It was also argued that she had never actually consented to the search. At the conclusion of the hearing,the court found that officers Denton and Ondejko had a reasonable, articulable suspicion which would justify a limited "stop" of the defendant as soon as she arrived in Detroit. App. at 21. The court went on to find, however, that the encounter between the police officers and defendant Coon was not a seizure. It found that when the officers approached defendant and obtained her permission to speak with her, "[s]he could have ignored the officers and proceeded through the second set of glass doors and left Metro Airport. However, she decided to stop and speak with the officers." App. at 23. The court further found that there was no evidence of coercion, trickery, or

intimidation on the part of the agents when they initially secured the defendant's permission to talk with her, and it found that defendant was not restrained in any way from leaving the public area in which she was originally approached. Under all those circumstances, the court concluded that "[a] reasonable person would have believed that she was free to leave...." App. at 24. That being the case, the court held that Coon had freely and voluntarily consented to the search of her luggage, and it therefore overruled her motion to suppress evidence.

Defendant Coon also argues that the district court abused its discretion at the trial in admitting evidence of her prior felony convictions under Rule 609(a)(1), Federal Rules of Evidence. In particular, she objected in limine to the government's proposed use of two relatively recent robbery convictions, claiming that their probative value was outweighed by their prejudicial effect. The court found that the defendant's credibility would be a central issue in the case because, if she testified at all, she would likely disclaim any knowledge of the fact that narcotics were being transported in her luggage. After defendant Coon testified that she had no knowledge of the narcotics, the court permitted cross-examination as to her prior convictions, and the jury returned a verdict of guilty upon which a judgment of conviction and a sentence of twelve years were entered on April 20,1989. This timely appeal followed.

Defendant raises two issues. First, she contends that the cocaine sized by narcotics officers should have been suppressed because the officers (a)

lacked probable cause to seize her or search her luggage, (b) lacked a reasonable suspicion to stop her, and (c) did not obtain a valid consent to open her luggage. Second, Ms. Coon insists that the trial court abused its discretion when it allowed the in the introduction into evidence of her two prior convictions for robbery which, she argues, have little probative value on the question of credibility but great prejudicial effect.

II.

A district court's factual findings made in consideration of a motion to suppress evidence are upheld unless they are clearly erroneous. See United States v. Rose, 889 F.2d 1490, 1494 (6th Cir. 1989). More specifically, questions concerning the voluntariness of a consent search are questions of fact and are reviewed under the clearly erroneous standard. See United States v. Jones, 846 F.2d 358, 360 (6th Cir. 1988) (per curiam). A finding of fact is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," see Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985), and where the district court's account of the evidence is plausible in the light of the whole record, its findings should be affirmed because "it is the function of the District Court rather than the Court of Appeals to determine the facts..." in a suppression hearing. Murray v. United States, 487 U.S. 533, 543 (1988).

A trial court's decision to admit or suppress evidence of prior convictions under Rule 609, Federal Rules of Evidence, is reviewed only to determine

whether the court abused its discretion. See United States v. Soloman, 909 F.2d 176, 181 (6th Cir. 1990); United States v. Williams, 587 F.2d 1 (6th Cir. 1978) (per curiam order).

III.

A. The Search

Defendant Coon argues that the cocaine seized from the luggage in her possession should have been suppressed because the seizing officers violated her Fourth Amendment rights. She further argues that the police seizure of the cocaine was unreasonable because no search warrant had bee obtained and because the officers at the initial point of encounter with her lacked probable cause to seize her or search the luggage in her possession.

The facts of the case show that the officers who approached the defendant in the Detroit Metropolitan Airport did so by simply walking up to her, properly identifying themselves, and politely asking her permission to engage in conversation. App. at 98,103. Ms. Coon concedes that she agreed to speak to the officers, that she voluntarily allowed them to inspect her flight ticket, and that she agreed to the search of her purse that revealed her driver's license and true name. Brief of Appellant at 7.

The police officers both testified without contradiction in the suppression hearing that Ms. Coon freely and unequivocally consented to the search of both pieces of luggage in her possession. App. at 96, 105. According to the officers, she expressed some doubt as to whether or not the suit bag in which the cocaine was found was hers. We believe

that her "afterthought" could not affect the validity of the search: either the bag was hers (in ownership or possession) and she consented to its search, or it was not hers and her consent to search it was unnecessary.[1] At the trial, Ms. Coon admitted that she consented to the search of the luggage by the officers.

The district court found that defendant Coon had neither been seized nor detained prior to giving her consent to search.

> Defendant remained in a public area, had possession of her ticket, driver's license, purse and luggage. She could have exited the last set of doors if she chose to do so. There is no evidence that defendant was coerced, tricked, or intimidated into stopping and speaking with the agents. Moreover, there is no evidence that defendant was compelled to remain or was restrained from leaving the interview area. Under such facts, we conclude that defendant was not in custody at any time prior to the discovery of the cocaine. A reasonable person would have believed that she was free to leave anytime after the officers stopped her. See U.S. v. Mendenhall, 446 U.S. 544, 554-55 (1980).

App. at 24

Based on these findings of fact, the court concluded that the defendant "freely gave her consent to the search." App. at 25. These findings of fact are

not clearly erroneous, because what happened in this case was neither a Fourth Amendment seizure nor a detention. Instead, it was a polite, voluntary encounter between a citizen and two police officers in the course of which there was no coercion or intimidation and which resulted in the citizen's grant of consent to search. As this court has previously explained,

> [n]ot all encounters between the police and citizens are seizures within the meaning of the fourth amendment. Terry v. Ohio, 392 U.S. 1, 19, 88 S. Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1868). Police questioning, by itself, does not result in a fourth amendment violation. Immigration & Naturalization Service v. Delgrado, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762-63, 80 L.Ed.2d 247 (1984); Florida v. Royer, 460 U.S. 491, 497, 103 S Ct. 1319, 1323-24, 75 L. Ed.2d 229 (1983). The request for , and examination of, an airline ticket and driver's license do not amount to a seizure under the fourth amendment. Royer, 460 U.S. at 501, 103 S. Ct. at 1326; see United States v. Collis, 766 F.2d 219, 221 (6th Cir.), cert. denied, 474 U.S. 851, 106 S. Ct. 150, 88 L.Ed.2d 124 (1985).

United States v. Winfrey, 915 F.2d 212, 216 (6th Cir. 1990), cert. denied, ____U.S.____, 111 S. Ct. 709 (1991).

The district court found that the Los Angeles police officers "had a

reasonable articulable suspicion to stop and question defendant at the moment she left the ticket area and headed for Flight 336. That reasonable suspicion was conveyed to the agents in Detroit." App. at 21. The district court, therefore, was justified in concluding that the Detroit police officers had the kind of suspicion that would permit a Terry stop. See Terry v. Ohio, 392 U.S. 1 (1968). This finding, however, is not necessary to a determination that the search of the defendant's luggage comported with the constitution, because the police officers would have been free to request consent to search even though they had no suspicion whatever of criminal activity on her part. While a request for consent to search in the absence of any suspicion might well be irrational or inexplicable, that fact would not render the consent any less free nor the fruits of any consequent search inadmissible.

In United States v. Flowers, 909 F2d 145, 147 (6th Cir. 1990), we held that not even an articulable suspicion on the part of police officers was a necessary predicate to sustaining a consent search. In Flowers, an airline passenger attracted the attention of the police because they thought he wore "inappropriate clothing" for the season and because he appeared to be nervous. An officer approached Flowers and asked permission to speak with him, as the officers in the present case did. The officer next asked for permission to see Flowers' airline ticket and, upon its production, noted that it was a one-way ticket purchased with cash. When the police officer finally asked Flowers' permission to search his person, Flowers agreed and the search revealed two

kilograms of cocaine taped to Flowers' stomach. The entire encounter with Flowers occurred in a public area outside the terminal at the Detroit Metropolitan Airport.

On facts very much like the ones in the present case, we held that the encounter in Flowers had no Fourth Amendment implications. In so doing we quoted from Florida v. Royer:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

Flowers, 909 F.2d at 147 (citations omitted) (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)). Considering the district court's findings of fact, the present case is legally indistinguishable from Flowers.

Ms. Coon denies that she consented to the search in question and argues that "[w]hen a seizure has taken place that doesn't result from objective justification, there is a strong presumption that the consent is involuntary." Brief of Appellant at 21.

In support of this proposition she cites United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977), and other cases which are distinguishable because in those cases the consent was preceded by, and therefore presumptively induced by, unconstitutional police conduct.

Defendant Coon also argues that her consent to the search in question was vitiated because the police officers never advised her that she had a right to refuse to consent. It suffices to say that such advice is not constitutionally required. Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973) (claims of constitutional rights to such advice "universally repudiated...and, we think, rightly so.").

Because the district court's findings of fact have not been shown to be clearly erroneous, we conclude that defendant Coon voluntarily consented to the search of the luggage in her possession without having been subjected previously to a stop or detention in violation of the Forth Amendment. Thus, since the facts show that there was not a seizure that led to the consent in question, the defendant's consent was therefore untainted, and the district court was correct in overruling the motion to suppress evidence.

B. Rule 609 Impeachment

Ms. Coon's final argument is that the trial court abused its discretion in allowing counsel for the government to cross-examine her concerning her two felony convictions for robbery, one in November 1985, the other in February 1986. Defendant Coon argues that robbery is a crime not involving dishonesty,

fraud, of deceit, and, therefore, her two robbery convictions do not bear on her credibility, at least not to the point of outweighing their prejudicial effects. For its part, the government does not attempt to justify the admission of these prior convictions on grounds that they are crimes of falsehood within the meaning of Rule 609(a)(2). Rather, it argues that the prejudicial effect of defendant's two prior robbery convictions was outweighed by their probative value in this case because this case might well turn on the credibility of the defendant as a witness.

In United States v. Williams, 587 F.2d 1, 2 (6th Cir. 1978) (per curiam order), we found no abuse of discretion in atrial court's ruling that a conviction for attempted armed robbery could be used to impeach a defendant on trial for possessing and passing counterfeit notes. Other circuits, as well, have decided that prior robbery convictions are admissible for impeachment purposes under the provisions of Rule 609(a)(1). United States v. Browne, 829 F.2d 760, 764 (9th Cir. 1987), cert. denied, 485 U.S. 991 (1988); United States v. Washington, 746 F.2d 104, 107 (2d Cir. 1984); United States v. Grandmont, 680 F.2d 867, 872 (1st Cir. 1982); United States v. McMillian, 535 F.2d 1035, 1039 (8th Cir. 1976), cert. denied, 434 U.S. 1074 (1978). The defendant has cited us to no case holding the contrary.

The credibility of the defendant was a key question in the trial of this case because her testimony, if believed, constituted a complete defense to the charge. If, as she claimed, she was the innocent dupe of some shadowy friends who

tricked her into being a drug "mule," then her possession of cocaine was innocent and not "knowing." On the other hand, a criminal record of previous robbery convictions might indicate that Ms. Coon was the type of person who could abandon her witness' oath if she felt it convenient to do so. Considering the centrality of the credibility issue in this case and the recency of Ms. Coon's previous convictions, the district court did not abuse its discretion in finding that the probative value of the prior convictions outweighed their prejudicial effects.

IV.

For the reasons stated, the judgment of conviction is AFFIRMED.

Issued as Mandate: April 11, 1991

Costs: None

Filing Fee: _____$
Printing _____$
Total _____$

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHEILA DARLENE COON,
A/K/A ELAINE DARLENE COON,
A/K/A KIM JOHNSON,

Defendant.

MEMORANDUM AND ORDER

The defendant was indicted for possession with intent to distribute approximately 250 grams of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(B)(ii) and 841(a)(1). The defendant has filed a motion to suppress the confiscated drugs alleging that the unwarranted stop and subsequent arrest violated her rights assured by the Fourth Amendment of the United States Constitution. After an evidentiary hearing on defendant's motion and consideration of the parties' briefs, we find that the government established by clear and convincing evidence that it had reasonable grounds to stop and question the defendant; that defendant was not taken into custody until after the contraband was discovered; and, further, that defendant consented to the search of the luggage at the Detroit Metropolitan Airport (Metro Airport).

The Los Angeles Police Department (LAPD) regularly monitors inbound and outbound flights at the Los Angeles

Airport (LA Airport) in response to the substantial transportation of narcotics between Los Angeles (L.A), a well-known "source city" of narcotics, and Detroit. Detective Edward Gossett of the LAPD testified that on June 1, 1988, at 10:30 p.m., two black males arrived at the LA terminal in a red compact automobile. After parking the vehicle, they entered the terminal together, and then separated once inside the terminal. Neither male carried any luggage. Both ben entered the ticket line of Northwest Airlines. Although one stood behind the other in the ticket line, they did not talk to or look at each other. However, both men continuously surveyed the terminal and carefully observed other passengers while waiting for an available ticket agent. Detective Gossett concluded from their actions that they were scouting the terminal for law enforcement officers. After 20 minutes, each proceeded to separate ticket agents purchased a ticket and separately exited the terminal. Once outside, these men entered the same red automobile and drove off together, Detective Ray Martin went to the Northwest Airline ticket agent and was informed that each of the men purchased, with cash, a one-way ticket on flight 336 and were assigned seats 16C and 19D. Flight 336 was scheduled to leave for Detroit around midnight, approximately an hour after these two men left the terminal.

Shortly before midnight, the same two men returned to the terminal in the same red compact. The man wearing the red sweatsuit again entered the Northwest Airline ticket line, while the second male remained in the automobile. After a few minutes, the second male entered the terminal through a different set of doors

that lead to the departure gates. He was wearing the same Addidas sweatshirt that he wore earlier that evening and was carrying a gym bag. Two officers approached the second male and identified themselves as officers of the LAPD. They advised him that they were looking for "smugglers," that he was not under arrest, and that he was free to leave. The officers then inquired whether he would answer a few questions; he agreed to do so. The officers asked for identification but he did not have any on his person. He identified himself as "Thomas Robertson," and gave the officers his ticket, which verified that he purchased a one-way ticket on Flight 336 with cash. After the man consented, the officers searched his gym bag. The bag contained a T-shirt and a pair of shoes, but no contraband. In response to further questioning, he told the officers that he arrived at the airport alone and in a taxi. The officers had no other questions so he proceeded to board Flight 336. Once aboard the aircraft, he sat in seat 16C. Seat 19D was not occupied when the aircraft was prepared for departure.

In the meantime, the man in the red sweatshirt bought another one-way ticket for flight 336 with cash. After this purchase, he was approached by defendant. Defendant was carrying two pieces of luggage, one was a shoulder bag and the other a garment bag. After a brief conversation, defendant gave the man in the red sweat suit the bags. After the ticket agent attached claim checks on the bags, he gave the other part of the claim checks to defendant. He then ordered defendant to "Hurry up, get on the plane, get out of here, get out of here." He stood there watching the defendant until

she was out of sight. He then left the LA Airport in the red compact automobile.

Officer James Gillispie went to the ticket agent and was informed that this man purchased a one-way ticket on Flight 336, with cash, in the name of "Kim Johnson." Officer Gillispie attempted to get in touch with Officer Martin at the departure gate to tell him about the exchange he overheard between the black male and the defendant. By the time Officer Martin received this information, the aircraft was ready for departure. Because he was unable to stop defendant before she entered the aircraft, Officer Martin called DEA Task Force Agent Moffitt in Detroit for assistance. He requested that Detroit agents stop and question defendant and the Addidas-clothed man when they arrived at Metro Airport. Agent Moffitt relayed this information to Officers Ray Denton and Michael Ondejko and assigned them to the investigation.

Upon arrival at Metro Airport, Agents Ondejko and Denton proceeded to the arrival gate of Northwest Flight 336. While surveilling the deplaning passengers, both agents immediately recognized the defendant and the man in the Addidas shirt from the detailed descriptions submitted by the LAPD. Defendant exited the plane first and the male followed. Officer Ondejko tracked defendant while Officer Denton followed the man in the Addidas shirt. The defendant stopped at the restroom first and then proceeded to the baggage claim area. On her way to the claim area, defendant was continuously looking around the terminal. Agent Denton lost contact with the man and went to baggage claim where he met Agent Ondejko. Both agents

maintained their surveillance of defendant. Eventually, defendant claimed her two pieces of luggage and passed through security by displaying the claim stubs she was given in L.A. The bags she claimed matched the bags described by the LAPD. As defendant approached the inner glass exit doors at Metro Airport, the agents approached defendant and identified themselves. They asked defendant if she would speak with them. Defendant agreed to do so and followed the agents through the exit doors to an area between the inner and outer glass exit doors at Metro Airport.

Officer Ondejko asked the defendant if he could see her airline ticket and she readily complied. She gave him a one-way ticket on Flight 336, purchased with cash, and issued to "Kim Johnson." Officer Ondejko returned the ticket and asked defendant for identification with a picture. Defendant responded that she did not have any. Defendant appeared very nervous. Her hands were trembling. The officers asked defendant if they could search her purse. Defendant consented and handed the officers her purse. Although the purse did not contain contraband, the officers noted a California driver's license issued to "Sheila Coon." In response to questioning, defendant explained that when asked earlier for identification, she thought the officers wanted "Kim Johnson" identification, which she did not have. Ad for the ticket, defendant claimed that a friend purchased the ticket for her. The officers then asked if they could search the bags in defendant's possession. Defendant consented stating that the shoulder bag was hers but that the garment bag only "looked like" hers. She was unsure

whether that bag was hers. Defendant consented to the search of the shoulder bag. The shoulder bag did not contain contraband and was returned to defendant. Defendant's response to whether the officers could search the garment bag was, "No, I am not sure it's mine." Officer Ondejko then unzipped the main compartment about 18 inches, defendant exclaimed that the bag was not hers because it contained men's clothing. However, when she made this exclamation the bag was barely unzipped and the officers knew she could not have observed its content. When the garment bag was fully opened, a "Snuggles" type fabric softener was located on top of the clothing. Upon further search, two "bricks" of cocaine were located at the top of the garment bag. At this point, the officers "arrested" defendant and read her her Miranda rights.

From the facts developed at the hearing, we conclude that the agents clearly had "reasonable suspicion" to justify the stop and questioning of defendant as she deplaned Flight 336. The agents did not act upon information derived from a mere airport "profile." Rather, they acted upon conduct occurring at the airport, which would lead any reasonable person to reasonably suspect that a crime was about to be or was being committed. The police observed two males enter the LA Airport to purchase one-way tickets on Flight 336 for cash. The flight was scheduled for early morning departure. Despite arriving at and departing LA Airport in the same vehicle, once in the terminal the two men acted as if they did not know each other. It was glaringly apparent that these men wanted to avoid attention and detection.They continuously surveyed the terminal area

while waiting to purchase the tickets. Moreover, on this purchase neither one had any luggage with him.

A short time later, the officers observed these men return in the same vehicle and in the same clothing. This time, only the man in the red sweatsuit waited in the red automobile. After a few minutes, this man entered the terminal through a door leading to the boarding area. When he was stopped, he told the officers that he arrived at LA Airport alone and by taxi. The officer knew this information was totally false. When stopped, this man did not have any identification and was carrying a gym bag containing only one shirt and another pair of shoes. Meanwhile, the man in the red sweatshirt proceeded to the ticket counter without any luggage. He purchased another ticket for Flight 336. Defendant then approached this man, took the newly purchased ticket, and gave him the two black bags she was carrying. He checked the baggage at the ticket counter and gave the claim stubs for the baggage to defendant. He then told defendant, "Hurry up, get on the plane, get out of here, get out of here." At this time, the officers knew that the man in the Addidas sweatshirt boarded the aircraft and occupied seat 16C and that seat 19D was vacant. Defendant followed this instruction and moved quickly toward the boarding gate.

It is clear to us from these facts that the officers had a reasonable articulable suspicion to stop and question defendant at the moment she left the ticket area and headed for Flight 336. That reasonable suspicion was conveyed to the agents in Detroit. They were justified in concluding from the

facts and circumstances developed at LA Airport that the defendant was committing or aiding and abetting the commission of criminal offense. Reasonable articulable suspicion is a flexible concept that does not require certainties. The agents had a right to draw common sense conclusions from the human behavior they observed.

Defendant argues that her likeness to a law enforcement "drug courier profile" alone did not amount to a "reasonable articulable suspicion," thus the stop was illegal. However, neither the Supreme Court nor the Sixth Circuit has established a per se rule regarding the significance of a "drug courier profile" when the government is attempting to justify a Terry stop. Florida v. Royer, 460 U.S. 491 (1983); U.S. v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977) [sic]. In Royer, the plurality opinion of the Court indicated that the presence of various factors of a drug courier profile could establish a sufficient reasonable suspicion to justify a temporary detention within the bounds of Terry. Royer, 460 U.S. at 506, fn. 10. The fatal flaw in defendant's argument is that she refutes the "suspicion" value of each profile factor individually but fails to refute their collective value. As held in Royer, the collective value of the drug profile factors can amount to a reasonable articulable suspicion that would justify a Terry investigation. Id.

Defendant next argues that she was not merely stopped and questioned at Metro Airport, but was "seized" at the moment the officers approached her. Since the agents did not have probable cause, defendant argues that her seizure

was illegal. We disagree. The testimony disclosed that the defendant was approached by two plain clothes agents. The agents identified themselves and asked defendant if she would speak with them. She agreed to do so and followed the agents to an area between the two sets of glass exit doors at Metro Airport. There was no evidence that defendant was coerced or intimidated into this area. Moreover, this area ia a public area and was precisely the direction defendant was heading. She could have ignored the officers and proceeded through the second set of glass doors and left Metro Airport. However, she decided to stop and speak with the officers.

The cases relied upon by defendant are clearly distinguishable. In those cases, the agents requested the suspected individuals to accompany them to a private area and threatened to detain the individuals until a warrant was obtained if they did not consent to a search of their luggage, or the agents kept the individuals' tickets or identification materials. The facts of their case are more aligned with U.S. v. Collis, 766 F.2d 219 (6th Cir. 1985). In Collis, DEA agents approached Collis from behind, tapped his shoulder, displayed their credentials, and orally identified themselves. The agents then asked Collis if he would answer some questions and Collis agreed. Collis produced a Mastercard and his ticket for identification and stated that his other identification papers were in his checked baggage. The agents asked Collis to return to the baggage area and he did. Collis argued that this request amounted to a seizure. The court disagreed. The court noted that there was no evidence

that Collis was intimidated of coerced into returning to the claim area. Moreover, the court also noted that there was no evidence that the agents restrained Collis while he was in the baggage area. Thus, the Court concluded that no seizure occurred.

The facts pertaining to defendant's stop are similar. Defendant remained in a public area, had possession of her ticket, driver's license, purse and luggage, she could have exited the last set of doors if she chose to do so. There is no evidence that defendant was coerced, tricked, or intimidated into stopping and speaking with the agents. Moreover, there is no evidence that defendant was compelled to remain or was restrained from leaving the interview area. Under such facts, we conclude that defendant wa not in custody at any time prior to the discovery of the cocaine. A reasonable person would have believed that she was free to leave anytime after the officers stopped her. See U.S. v. Mendenhall, 446 U.S. 544, 554-55 (1980).

Finally, defendant argues that her consent to search her purse and luggage was not freely and voluntarily given because she was in custody at the time. However, it is apparent that defendant was not in custody at the time of the search. She was not in custody until after the discovery of the cocaine. Defendant was not threatened with detention if she did not consent to the search. We find that she freely gave her consent to the search. The agents returned defendant's ticket, purse, and driver's license after inspecting them. Defendant was not taken to a private office during the questioning but remained is a public area with two doors available to defendant throughout the

officers' investigation. The agents conducted their investigation within the time and space limitations of Terry v. Ohio, 392 U.S. 1 (1968).

Accordingly, IT IS ORDERED that the defendant's motion to supress is DENIED.

/s/ Robert E. DeMascio
Senior United States District Judge

Dated: January 6, 1989

1. Defendnat apparently abadoned the strategy of disclaiming the luggage in question, at least for the purposes of her motion to supress. A successful disclaimer, of course, would have undercut her standing to move for supression.